JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 13/95

COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A. (AG.)

BETWEEN	**THE ATTORNEY-GENERAL**	**APPELLANT**
AND	**MAURICE FRANCIS**	**RESPONDENT**

Nicole Foster and N. Simmonds instructed by **Director of State Proceedings** for Appellant

Charles Campbell and **Arlene Harrison-Henry** for Respondent

23rd, 24th, 25th, 26th, November, 1998
& 26th March, 1999

RATTRAY, P.

This appeal challenges the quantum of damages awarded to the respondent by Courtenay Orr, J in the Suit brought by the respondent against the Attorney-General and District Constable Owen Campbell. The respondent claimed damages for assault and battery. Liability was not contested and District Constable Campbell was not a party to the appeal. Indeed, he had not been served with the writ of summons and therefore did not participate in the trial.

The respondent was shot by District Constable Campbell whilst the District Constable was carrying out police duties. As a result the respondent suffered serious injuries.

The facts so far as they are necessary for the purpose of the assessment of damages are thus stated in the judgment of Orr, J under the heading:

> "The Court's Findings of fact
>
> On the 14th September, 1989 at about 5.00 p.m. the plaintiff was walking through a short cut behind the Annotto Bay Police Station when he saw the first defendant pointing a gun at him. The first defendant fired a shot at him. It missed him. He turned and ran but the first defendant fired a second shot which entered his body through his back over the 5th thoracic spine."

The findings of the Court with respect to the injuries suffered may be briefly summarised as follows:

> (i) bullet entry wound in the back at the level at the 4th and 5th thoracic vertebrae;
>
> (ii) total disruption of the spinal cord at that level;
>
> (iii) damage to the right lung which was partially collapsed;
>
> (iv) a wound to the mouth and one to the nose occurring when the respondent fell to the ground.

The consequences to the respondent of these injuries were:

> (i) complete paralysis from the level of the bullet wound down;
>
> (ii) permanent impotence as well as incontinence as to urine and faeces;
>
> (iii) pressure sores arising from his hospitalisation from which he will continue to suffer for the rest of his life.

The medical assessment was 60% permanent impairment of the whole person.

The trial judge's award on the assessment of damages was the sum of $9,170,173.52; being (a) special damages $57,935.52 with interest at 3% from 14th September 1989 to 20th of December, 1994 (b) general damages $9,112,240.00 being (i) $3.5.m for pain and suffering and loss of amenities (ii) $3.5m for exemplary

damages and both items bearing interest of 3% from 20th of August, 1981 to 20th December, 1994 and (iii) sums amounting to $212,112, 240.00. comprised as follows:

I. Handicap on the labour market	$750,000.00
II. Loss of future earnings	$351,000.00
III. Costs of replacement of wheelchairs	$112,000.00
IV. Costs of medical dressing	$160,560.00
V. Costs of Pampers	$270,000.00
VI. Costs of household attendant	$468,000.00

During the final address at the trial of counsel then representing the appellant it was pointed out by him that the claim for exemplary damages was not properly pleaded because the facts on which this claim was made had not been particularised. This was admitted by counsel for the respondent who at that stage made an application to amend the statement of claim to cure this defect. The application was granted. In fact the amendment only repeated the circumstances under which the shooting had taken place and alleged "that the shooting of, and at, the plaintiff, by the first defendant, occurred at 5.00 p.m. in the vicinity of Annotto Bay Police Station, in view of the public, and was done in an unconstitutional, arbitrary, and oppressive and willful manner in breach of the plaintiff's constitutional rights."

The appeal therefore poses the following questions:

> 1. Was the trial judge in error in allowing the amendment which he did at the very late stage in the proceedings to wit during the final submissions of counsel for the appellant?
>
> 2. Was there "double counting" by the trial judge when having awarded (a) $3.5m for pain and suffering and loss of amenities (b)$351,000 for loss of future earnings, he proceeded further to award the sum of

> $750,000.00 under the heading of "Handicap on the Labour Market"?
>
> 3. Was the amount of $3.5m for exemplary damages manifestly excessive bearing in mind the substantial sum of $3.5m awarded for pain and suffering and loss of amenities?
>
> 4. In the absence of any evidence that the employer the State represented by the Attorney-General authorised, ratified or approved the act of the respondent or was blameworthy in some other manner in relation to its employment or supervision of the wrongdoer its servant or agent was it proper for the trial judge to make any award under the head of exemplary damages against the Attorney-General?

With respect to (1) the Statement of Claim at the time when counsel for the plaintiff/respondent made his application had indeed stated:

> "And the plaintiff claims damages and exemplary damages by virtue of the fact that he was shot by the firstnamed defendant in a manner which constituted a breach of the plaintiff's constitutional rights and the exercise of brutal force by the firstnamed defendant in a manner which was an abuse of power and authority."

What was not pleaded or particularised as required were the facts upon which the plaintiff relied to support the claim for exemplary damages. Counsel for the plaintiff/respondent therefore applied to amend the Statement of Claim to insert the required particulars.

In these circumstances in my view the exercise of the discretion by the judge to permit the amendment did not result in any injustice to the appellant even though made at this late stage of the proceedings.

With respect to (2) having read in draft the judgment of Langrin, J. (Ag.) and for the reasons stated therein I agree with his reasoning and conclusion that no award should have been made in respect of handicap on the labour market as this

item of damages would have already been dealt with and form a component of the award of loss of future earnings.

With respect to (3) I also agree with the reasoning and conclusion of Langrin, J (Ag.) that having made a substantial award of $3.5m for compensatory damages the award of a similar sum for exemplary damages in this case is manifestly excessive. Indeed it is surprising that the trial judge should have awarded the large sum he did as exemplary damages since in his judgment in stating the principles which he was following and referring to Lord Devlin's judgment in ***Rookes v. Barnard*** [1964] 1 All E.R 367 he stated - "Awards of exemplary damages should be moderate." I therefore concur with Langrin, J.A. (Ag.) that the sum of $100,000.00 would be appropriate.

With respect to (4) despite its attractiveness Miss Foster's well researched presentation on behalf of the appellant in her attempt to convince the Court that certain elements of blameworthiness must be established before the State can be saddled with the responsibility for the action of its servants or agents is in my view flawed.

In attempting to catalogue a list of situations in which it would be appropriate to award exemplary damages Lord Devlin in ***Rookes v. Barnard*** (supra) at page 410 stated as follows:

> "The first category is oppressive, arbitrary or unconstitutional action by servants of the government. I should not extend this category, I say this with particular reference to the facts of this case, - to oppressive action by private corporations or individuals."

It would indeed be rare to find a case in which the State specifically authorised or condoned such actions. The State by employing the perpetrator as a protector of the rights of the citizens and the keeper of the peace does hold out to the public

that the policeman will conduct his duties with due regard to the rights of the citizen.

Section 3(1) of our Crown Proceedings Act provides:

> "Subject to the provisions of this Act the Crown shall be subject to all those liabilities in tort to which, if it were, a private person of full age and capacity, it would be subject -
>
> (a) in respect of tort committed by its servants or agents;"

Section 3(3) provides:

> "Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown."

These provisions are clear and unambiguous. In the face of these statutory provisions therefore, Miss Foster's submission that only in circumstances where the Crown ordered the Act to be done or was culpable in some way in employing the particular officer to perform these functions could the Crown suffer exemplary damages as a result of the act of the officer, must indeed fail.

I would allow the appeal and vary the award of the trial judge in the following respects:

1) Exemplary damages of $3.5m reduced to $100,000.00

2) The sum of $750,000.00 under the heading of Handicap on the Labour Market set aside and no award made under this heading.

The appellant will have the cost of this appeal to be taxed if not agreed.

HARRISON, J.A.

I have read the draft judgment of Rattray, P. and Langrin, J.A. (Ag). I agree and have nothing further to add.

LANGRIN, J.A. (Ag).

This appeal is against that part of an order of Orr J in the Supreme Court dated 20th December, 1994 whereby he awarded the plaintiff/respondent $3,500,000 for Pain and Suffering and Loss of Amenities $3,500,000 for Exemplary Damages, $750,000 reflecting Handicap on the labour market as well as $351,000 for loss of future earnings.

The grounds on which the appellant relies are:

(1) The trial judge erred in granting the amendment without any good ground or justification after the Appellant had closed his case. This was prejudicial to the Appellant to an extent which could not be remedied by costs or an adjournment.

(2) The trial judge erred in that he acted upon wrong principle of law in arriving at the multiplier for the items of future care and expenses (abandoned).

THE AWARD OF EXEMPLARY DAMAGES

(3) The trial judge erred in the estimate of exemplary damages assessed to which the Respondent was entitled.

(4) The trial judge erred in the estimate of exemplary damages in that he did not take into consideration the size of the compensatory damages assessed in determining the punishment.

(5) The trial judge erred in the estimate of exemplary damages in that he did not take into consideration the range of previous awards with regard to the existing social, economic and industrial conditions.

(6) the trial judge erred in law and in fact in concluding that the Appellant was vicariously liable to pay

exemplary damages as there was no evidence before him:

a) that the Appellant had approved or ratified the act of the First Defendant;

b) that the Appellant had authorized the doing and manner of the act;

c) that the First Defendant was unfit and the Appellant was reckless in employing or retaining him;

d) that any other circumstances existed which made it proper that the Appellant be vicariously liable to pay exemplary damages.

The chronology of events leading up to the amendment of the pleadings are as follows: On September, 14, 1989 there was the shooting incident resulting in the injury of the Plaintiff. A Writ of Summons and Statement of Claim was served on the appellant. On December 9, 1992 Interlocutory Judgment was entered against the appellant.

The hearing on assessment of damages was heard between 10th and 18th February, 1994. During the closing address of counsel for the appellant it was indicated that exemplary damages had not been properly pleaded. On July 26, 1994 the respondent served Notice of Intention to seek leave to amend the Statement of Claim in order to plead exemplary damages properly. The respondent on July 29, 1994 sought leave to amend the Statement of Claim to particularize the facts relied on in support of the claim for exemplary damages. The appellant objected and the matter was argued before the trial judge who allowed the amendment and offered an adjournment to the appellant but this offer was declined. The hearing was completed on that date.

The Statement of Claim contained inter alia in paragraph 6 the statement as follows:

> "And the plaintiff claims damages and exemplary damages by virtue of the fact that he was shot by the first named defendant in a manner which constituted a breach of the plaintiff's constitutional rights and the exercise of brutal force by the first named defendant in a manner which was an abuse of power and authority".

The Court of Appeal in ***The Attorney General et al vs Noel Gravesandy*** SCCA 3/80 delivered December 20, 1982. decided that exemplary damages must be specifically pleaded. White, J.A in delivering the judgment of the Court stated at pg. 4:

> "Consequent on the judgment in the House of Lords ***Cassells & Co. Ltd. v Broome*** [1972] A.C. 1027 2 WLR 645, 684, the Rules of the Supreme Court in England were amended so that exemplary damages must be specifically pleaded together with facts relied on. The object of the Rule is to give the defendant fair warning of what is going to be claimed with the relevant facts and thus prevent surprise at the trial, to avoid the need for any adjournment of the trial on this ground, and at the same time, extend the ambit of the discovery before trial".

Although our Judicature (Civil Procedure Code) Law has not been amended to include the above stated rule it forms part of the rule in Jamaica in light of Section 686 of the Civil Procedure Code which provided:

> "Where no other provision is expressly made by Law or by Rules of Court, the procedure and practice for the time being of the Supreme Court of Judicature in England, shall so far as applicable be followed and the forms prescribed shall with such variations as circumstances may require, be used".

The amendment which was granted by the learned trial judge is as under:

> "6. The plaintiff claims Exemplary Damages and relies upon the following Particulars of Facts:
>
> (a) the plaintiff was walking along a public road, when the first defendant pointed a

firearm at the plaintiff and shot at him without cause or justification;

(b) that the plaintiff fled, and the first defendant pursued, firing at the plaintiff shooting him in the back;

(c) that thereafter the first defendant went to the fallen plaintiff pointed his firearm at the plaintiff who was on the ground, and had to be restrained by members of the public from causing any further harm to the plaintiff. The defendant then ran away; and

(d) that the shooting of, and at, the plaintiff, by the first defendant , occurred at 5:00 p.m. in the vicinity of Annotto Bay Police Station, in the view of the public, and was done in an unconstitutional, arbitrary and oppressive and wilful manner, in breach of the plaintiff's constitutional Rights."

It was argued on behalf of the appellant that the amendment was unjust particularly because of its timing and so the costs of an adjournment would not help at that time. The appellant had conducted his case on the basis that these matters were not properly pleaded.

Since trial of the matter was taking place five years after the incident, an adjournment would not have put the appellant in a position to investigate all the minute details such as whether - the first defendant pursued the plaintiff or pointed the gun at a fallen plaintiff and had to be restrained.

Mr. Charles Campbell, counsel for the respondent submitted in the main that the Court has powers of amendment pursuant to Sections 259 and 270 of the Civil Procedure Code. The suit commenced with pleadings including exemplary damages and accordingly the appellant was in fact fixed with knowledge of the claim for a

considerable period prior to the hearing of the assessment of damages. There was fair warning of the claim for exemplary damages.

It is settled law that at the trial of an action leave to amend may be granted when to do so will not cause injustice to the other side and on proper terms as to costs and the adjournment of the trial, if necessary. The discretion of the Court is based on considerations of prejudice and injustice.

The Rule in the 1988 Edition of the White Book at Order 18 R8 goes further to state inter alia:

> "First it requires that the claim for exemplary damages must itself be specifically pleaded, and this must be done in the body of the statement of claim and not merely in the prayer, and it must be made in addition to any other claim for damages... secondly, it requires the facts on which the party relies to support his claim for exemplary damages to be pleaded".

The dictum of Bowen, L.J in ***Cropper v Smith*** [1884] Ch. D 700 at 710, 711 expressed the practice of granting amendments on the basis of a wider principle:

> "I think it is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights... I know of no kind of error or mistake which, if not fraudulent or intended to overreach the court ought not to correct, if it be done without prejudice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favor or of grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as such a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case of right".

And he went on to say:

> "I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have very seldom if ever been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such disadvantage as that it cannot be cured by the application of that healing medicine...".

It may be useful to point out that the facts on which the amendment is based were already in evidence and had not been challenged. Furthermore the facts fell within the ambit of the first category as defined in ***Rookes v Barnard*** [1964] A.C. 1129. That being so the appellant could not have been caught by surprise. Indeed the appellant declined the offer of an adjournment made by the judge.

I have no hesitation in agreeing with the learned trial judge that having regard to all the circumstances it was proper to grant the amendment.

I now turn to the facts of the case. The events which led to this action being filed are admirably stated in the judgment of Orr, J and are as follows:

> "On September 14, 1989, at about 5:00 p.m. the plaintiff was walking through a short cut behind the Annotto Bay Police Station when he saw the first defendant pointing a gun at him. The first defendant fired a shot at him. It missed him. He turned and ran but the first defendant fired a second shot which entered his body through his back over the 5th thoracic spine.
>
> The plaintiff fell to the ground- face downwards. A nail pierced his nose as he fell. He was bleeding from his nose and mouth, and felt pain all over his body. he tried to get up but his legs did not respond. The first defendant came and stood over him with the gun pointed at him. A voice cried out 'You a go kill de woman pickney'. Then the first defendant turned and ran away. Throughout the entire episode he said nothing to the plaintiff.
>
> The plaintiff was in his seventeenth year when he was shot. He is twenty two years old now.

> He was admitted to the Annotto Bay Hospital the day of the injury and transferred to the Kingston Public Hospital that same night. He remained there until the 29th September, 1989 when he returned to the Annotto Bay hospital, and was a patient there until October 10, 1989. From there he went to the Mona Rehabilitation Centre from which he was discharged on the 28th January, 1990.
>
> He had a bullet entry wound in the back at the level of the fourth and fifth thoracic veterbrae, with total disruption of the spinal cord at the same level and damage to the right lung which collapsed partially. He also had a wound to the mouth and one to the nose which occurred when he fell.
>
> As a result of these injuries he has been completely paralyzed from the level of the bullet wound down, since the day of the injury. He is permanently impotent and incontinent both as to urine and faeces. Since his hospitalization he has been suffering from pressure sores, and he will continue to suffer from them for the rest of his life. At first he could voluntarily pass urine and was fitted with a catheter; but he is now able to do so after training. He wears a condom and bag to collect the urine. A tube was inserted in his chest to remove air and blood which had gathered in his lung.
>
> The plaintiff now has sixty percentum permanent impairment of the whole person. The bullet is still in his body. He will need someone to take care of his sores for the rest of his life. It is likely that he will develop scarring and fibrosis of the injured lung, and when he gets a cold his lung functions are likely to be compromised and this could cause pain when he coughs. His life span has been reduced by approximately twenty percentum".

A number of cases in Mrs. Khan's compilation of assessment of damages were referred to in order to see the range of awards being made by the Court in respect of similar injuries.

Patrick Locke v Attorney General C.L. 1987 L.070 - award made December 1991:

Bullet wounds to the chest and upper arm, paralysis of both lower limbs, paraplegic expected to be permanent. Awarded $1,500,000 which would be worth $3,421,000 approximately today.

Gray v Attorney General C.L. 1986 G008 - award made March, 1989. Entry wound at the right side of his chest. Damage to spinal cord. Paraplegic between 12th thoracic and first lumbar segments complete paralysis below middle of abdomen. Doubly incontinent. Sixty percent permanent disability of total body function. Awarded $352,000 which is equal to $2,145,000 today.

In neither of the above cases was a claim made for exemplary damages.

Owen Francis v Baker & Attorney General SCCA 109/91 award made November, 1992.

Gunshot wound to left chest at the left margin . Damage to left kidney spleen, left hemi-diaghragm, left lung and pleura and small intestine. Loss of left kidney. Loss of spleen. Damage of spinal cord. Traumatic paraplegic at the level between 12th thoracic and first lumbar vertebrae on the left side. Traumatic paraplegia at the fifth lumbar veterbrae on the right side. Total disability from the 16th June, 1985 to 30th September 1985. Inability to walk. Fifty percent disability. Awarded $500,000 on appeal, which is equal to $818,000 approximately today also Exemplary and aggravated damages $100,000.

Compensatory damages are to compensate the plaintiff for real harm done and are appropriate in torts which require actual damage. The purpose of an award of

compensatory damages is as far as money can do, to place the plaintiff in the position he was in before the tort was committed. The judge found that the injuries and disability of the instant plaintiff are as great as Mr. Locke's . He therefore went on to award him aggravated damages of $3,500.000.

In the instant case the total compensatory award is as follows:

Special Damages	-	$ 57,933.52
Cost of future medical dressing		$ 160,560.00
Cost of pampers in the future		$271,680.00
Cost of paying an attendant		$468,000.00
Pain & Suffering and Loss of Amenities		$3,500,000.00
Cost of Future wheelchairs		$ 112,000.00
Loss of Future earnings		$ 351,000.00
Handicap on Labour Market		$ 750,000.00
TOTAL		$5,671,173.52

This award has not been challenged on appeal except for the award of $750,000.00 (handicap on the labour market) but counsel for the appellant demonstrated in argument that it was adequate to compensate the plaintiff for the injuries and disability suffered by him.

A serious challenge was advanced by Miss Foster to the sum of $750,000.00 awarded for Handicap on Labour Market. I now turn to this aspect of the assessment.

It was submitted by Counsel for the appellant that the trial judge erred in law in awarding a sum for handicap on the labour market as he did not take into account the lump sum awarded to the plaintiff/respondent to compensate for his loss of earnings during his entire working life.

The approach of the learned judge to this aspect of damages is to be found in this part of his judgment.

> "The plaintiff tried to go back to his old work, but was unable to cope. Professor Golding felt that his ability to do so may have been reduced by as much as 80%. I therefore find that it is highly improbable that he will ever be able to work as a tailor. In view of his disability and the economic situation in the country, I also think it very unlikely that he will ever be able to obtain employment.
>
> I take into consideration the disappointment he must feel at not being able to achieve his ambition of being a tailor, or to experience enjoying the respect and appreciation of satisfied customers. He is unlikely to know the sense of achievement in working at his chosen occupation...".

The gravamen of the challenge to award is that the plaintiff was awarded a total loss of future earnings using a multiplier of 15 years. The sum represented all he would have earned had he worked during his working life. It was therefore a duplication of compensation to further award the plaintiff $750,000 for loss of earning capacity.

In ***Fairley v John Thompson Ltd.*** [1973] Lloyds Report p. 40 at p. 42 Lord Denning MR emphasized the distinction between loss of earnings and loss of earning capacity (handicap on the labour market) when he said *:*

> "It is important to realise that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages".

It is clear from the evidence that the plaintiff will never be able to work at his trade for the rest of his life. In the circumstances there should be no award of handicap on the labour market. Any award for specific wage loss in the future has already been dealt with in the award of loss of future earnings.

Exemplary damages are awarded to punish the defendant for his conduct and to deter such behaviour in future. The circumstances in which exemplary damages may be awarded are set out in the speech of Lord Devlin in ***Rookes v Barnard*** (supra). Because the principle of punishing the defendant is objectionable in the civil law of tort, such damages can only be awarded in certain torts and in very limited type of cases.

There are two categories of facts which may justify an award of exemplary damages. The relevant category as stated in ***Rookes v Barnard*** (supra) is defined at p.1226 as:

> "The first category is oppressive, arbitrary or unconstitutional action by servants of the government... for the servants of the Government are also servants of the people and the use of their powers must also be subordinate to their duty of service".

This category included oppressive arbitrary or unconstitutional action by persons holding public positions eg. government departments, the police, defence force and local government employees. The typical award would be in a successful action for trespass to the person, false imprisonment or malicious prosecution against the police.

The Court of Appeal in Jamaica by their decision in ***Douglas v Bowen*** [1974] 12 JLR 1544 adopted the above category of cases in which exemplary damages may be awarded.

As the law now stands as long as the offending conduct is within the scope of employment then the employer must bear responsibility. The deterrent effect of the award on employees should encourage them to achieve greater control and more effective supervision.

Miss Nicole Foster, counsel for the appellant in her very able and wide ranging submissions sought to persuade this court to examine the issue of the appellant/employer being liable vicariously for exemplary damages.

She submitted that the American Law Institute proposals on punitive damages in the Restatement of the Law of Torts [1979] is an acceptable and proper position.

These principles are as follows:

> "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:
>
> > (a) the principal or a managerial agent authorised the doing and the manner of the act, or
> >
> > (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining, or
> >
> > (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
> >
> > (d) the principal or a managerial agent of the principal ratified or approved the act".

Great reliance was placed on the Canadian cases of ***Peters v Canada*** [1993] 108 D.L.R. 4th 471 and ***G.B.R. v Hollett et al*** [1996] 139 D.L.R 4th 260 in support of this proposition.

At this juncture it seems appropriate to refer to Vicarious Liability by Professor Atiyah at pg. 435 which was adopted by the learned trial judge:

> "...In certain types of action, in particular false imprisonment , purely compensatory damages might not

> be an adequate deterrent against repetition and it may well be that the deterrence would be more effective if aimed against the employers rather than the servant. The question could become of practical importance with the recent introduction of vicarious liability for police officers. If a policeman were to make an arrest in wholly unjustifiable circumstances it would seem right that the vicarious liability of the Chief Constable should extend to exemplary damages, for otherwise there might be no sufficient incentive to the police authorities to take stern measures with a view to preventing repetition of the offence".

The law as it now stands is quite clear and certain and I do not find it necessary to modify its terms at this time.

In ***Cassell v Broome*** [1972] 1 All E.R. 801 at 833 Lord Hailsham examined the considerations outlined by Lord Devlin and extrapolated inter alia the following principles:

> (1) The burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories;
>
> (2) the mere fact the case falls within the categories does not entitle the jury to award damages purely exemplary in character; they can and should award nothing unless;
>
> (3) they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium I have explained ; and
>
> (4) that in assessing the total sum which the defendant should pay, the figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say should be a round sum larger than the latter and satisfying the jury's idea of what the defendant ought to pay. (emphasis supplied)
>
> (5)... damages remain a civil, not a criminal remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that, in making such an award they are putting money into a

> plaintiff's pocket and not contributing to the rates or to the revenue of central government.

In applying these principles and taking into consideration that the employer would have already had to pay compensatory damages which is a penalty in itself the sum of $3.5M awarded by the trial judge is extremely high.

In the case of ***Owen Francis v Attorney General*** (supra), a similar case of police liability the Court of Appeal made an award of $100,000.00 for Exemplary and Aggravated Damages. I regard this sum as adequate to achieve the deterrent effect on employees as well as to achieve better control and supervision.

The award under this head should be reduced from $3.5M to $100,000.00.

Finally, I would not make an award for Handicap on the Labour Market and would reduce the award of exemplary damages from $3.5M to $100,000.00.